INSTITUT C.D. HOWE INSTITUTE

COMMENTARY
NO. 459

Investor-state Dispute Settlement in CETA: Is it the Gold Standard?

The investment provisions in CETA have become a lightning rod for critics of the trade pact within Europe. But in its current form, the CETA text goes a long way to address those concerns, albeit with room for improvement.

J. A. VanDuzer

About The Author

J. A. VanDuzer
is Professor, Faculty of Law,
at the University of Ottawa.

The Institute's Commitment to Quality

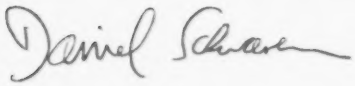
C.D. Howe Institute publications undergo rigorous external review by academics and independent experts drawn from the public and private sectors. The Institute's peer review ensures the quality, integrity and objectivity of its policy research. The Institute will not publish any study that, in its view, fails to meet these standards.

The Institute requires that its authors publicly disclose any actual or potential conflicts of interest of which they are aware.

In its mission to educate and foster debate on essential public policy issues, the C.D. Howe Institute provides nonpartisan policy advice to interested parties on a non-exclusive basis. The Institute will not endorse any political party, elected official, candidate for elected office, or interest group.

As a registered Canadian charity, the C.D. Howe Institute as a matter of course accepts donations from individuals, private and public organizations, charitable foundations and others, by way of general and project support. The Institute will not accept any donation that stipulates a predetermined result or policy stance or otherwise inhibits its independence, or that of its staff and authors, in pursuing scholarly activities or disseminating research results.

Commentary No. 459
October 2016
Trade and International Policy



Daniel Schwanen
Vice President, Research

$12.00
ISBN 978-1-987983-05-0
ISSN 0824-8001 (print);
ISSN 1703-0765 (online)

The Study In Brief

The investor provisions of CETA, the Canada-EU Comprehensive Economic and Trade Agreement, have been a lightning rod for critics of the trade deal. The main focus of concern, particularly within EU states, has been the investor-state dispute settlement (ISDS) provisions. Indeed, following the release of the 2014 text, some European voices called for the ISDS provisions to be removed.

However, a "legal scrub" of the CETA text in February 2016 addressed many concerns, including those regarding the independence of ISDS arbitrators and the quality and consistency of their decisions. This *Commentary* revisits the essential rationale for ISDS, the main concerns that have been expressed about the process, and the extent to which CETA addresses them.

As it stands, CETA incorporates many of the best aspects of current Canadian treaty practice as well as some further innovations with a view to addressing concerns about ISDS. Indeed, ISDS in CETA takes a significant step away from the ad hoc arbitration model found in NAFTA and other investment agreements, as well as in the recently released text of the Trans-Pacific Partnership Agreement (TPP), by creating a standing dispute settlement tribunal to hear investor-state cases and an appellate body.

Despite these innovations, CETA does not fully respond to ISDS critics. It does not create an institution with full-time judges to deal with investor-state disputes. Nor does it fully guarantee the independence of decisionmakers in the same manner as domestic judicial systems. Nevertheless, CETA represents the most substantial response to critics' concerns in any investment treaty to date.

The introduction of standing and appellate tribunals, despite some admittedly incomplete institutional guarantees of independence, is a significant step toward a fully judicialized dispute resolution system. The ISDS provisions in CETA represent an important stage in the reform process, but certainly not the end point. Indeed, CETA itself contemplates its further development.

One of the practical challenges in getting to a true gold standard is cost. It is hard to justify funding permanent full-time, first-instance and appeals courts that may not have a steady diet of cases. While the scale of the two-way investment relationship between Canada and the EU is large and growing, it is impossible to predict the frequency of investor-state cases. A multilateral tribunal and appellate body would be more cost effective. The CETA parties have agreed to pursue the establishment of such institutions and to shift CETA disputes to them should they ever be put in place.

While not perfect, CETA's approach has the best claim to legitimacy in any treaty to date.

C.D. Howe Institute Commentary© is a periodic analysis of, and commentary on, current public policy issues. Michael Benedict and James Fleming edited the manuscript; Yang Zhao prepared it for publication. As with all Institute publications, the views expressed here are those of the author and do not necessarily reflect the opinions of the Institute's members or Board of Directors. Quotation with appropriate credit is permissible.

To order this publication please contact: the C.D. Howe Institute, 67 Yonge St., Suite 300, Toronto, Ontario M5E 1J8. The full text of this publication is also available on the Institute's website at www.cdhowe.org.

On September 26, 2014, Canada and the European Union (EU) released the text of their proposed Comprehensive Economic and Trade Agreement (CETA), apparently marking the successful end of negotiations that had been ongoing since 2009.[1]

According to the federal government, CETA is "broader in scope and deeper in ambition" than any previous trade and investment treaty including NAFTA. International Trade Minister Chrystia Freeland has called it a "gold standard." Once ratified, CETA will provide Canadian exporters access to a more than 500-million-person market. The 2011 Sustainability Impact Assessment by the EU completed prior to the conclusion of the treaty negotiations concluded that CETA would "provide an annual boost of up to $7-billion to the Canadian economy," on the back of an increase of up to 2% in Canadian exports (European Commission 2011). For the EU, CETA represents its first free trade agreement with a leading industrialized country, and the joint study forecast that Europe would receive even greater benefits.

CETA is also the first European trade treaty with comprehensive investment provisions. The treaty is to replace Canada's Foreign Investment Promotion and Protection Agreements (FIPAs), as bilateral investment treaties are known in Canada, with EU members Poland, Hungary, Bulgaria, Romania, Latvia, the Czech Republic and the Slovak Republic. CETA's investment provisions have been closely scrutinized worldwide as the first indication of what EU-level investment commitments might look like elsewhere, including as a possible model for the much more economically significant Trans-Atlantic Trade and Investment Partnership (TTIP) currently being negotiated by Europe and the United States.

Much of the reaction to the CETA investment provisions, however, has been negative, especially in Europe. The main focus of concern has been the investor-state dispute settlement (ISDS) provisions.[2] Indeed, following the release of the 2014 text, some European voices called for the ISDS provisions to be removed.[3]

In February 2016, Canada and the EU released a revised CETA text that represented the results of a "legal scrub" of the 2014 text, including the creation of a new standing tribunal for investor-state disputes and an appellate body. These changes were apparently designed as a response to European concerns regarding the independence of ISDS arbitrators and the quality and consistency of their decisions. In large part, the new provisions were

The author thanks Daniel Schwanen, Lawrence Herman, Matthew Kronby and several anonymous reviewers for their comments on earlier drafts. He retains responsibility for any errors and the views expressed here.

1 This *Commentary* is based on the CETA text released on February 29, 2016, which is said to embody the final outcome of negotiations.

2 Other concerns relate to whether substantive investor protection obligations, like the requirement to provide fair and equitable treatment, unduly restrict a state's right to regulate (European Commission 2015).

3 The European Parliament passed a resolution in July 2015 endorsing TTIP but rejecting ISDS in the form then in CETA (European Parliament 2015). Key politicians in some EU member states had expressed serious concerns about ISDS in the 2014 text (Gabriel 2014).

based on a Concept Paper that had been circulated by the EU in May 2015 (European Commission 2015) related to the TTIP negotiations.[4] However, in Europe, unions, other civil society groups and some politicians continue to oppose CETA's ISDS provisions, even in their revised form.[5]

This *Commentary* revisits the essential rationale for ISDS and the main concerns that have been expressed about the process. As will be seen, CETA incorporates many of the best aspects of current Canadian treaty practice as well as some further innovations with a view to addressing concerns about ISDS. Indeed, ISDS in CETA takes a significant step away from the ad hoc arbitration model found in NAFTA and other investment agreements, as well as in the recently released text of the Trans-Pacific Partnership Agreement (TPP), by creating a standing dispute settlement tribunal to hear investor-state cases and an appellate body.

Despite these innovations, CETA does not fully respond to ISDS critics. It does not create an institution with full-time judges to deal with investor-state disputes. Nor does it fully guarantee the independence of decisionmakers in the same manner as domestic judicial systems. Nevertheless, CETA represents the most substantial response to critics' concerns in any investment treaty to date.

The Traditional Rationale for ISDS

ISDS provisions allow investors from one party state to seek compensation from another party state through binding arbitration when that state allegedly has failed to comply with its investor protection obligations in the treaty. This investor right to bring claims for treaty breaches distinguishes investment treaties from almost all other international instruments, which do not permit private parties to claim relief directly. When ISDS first began to become a common feature of bilateral investment treaties in the 1960s, the main goal was to ensure that investors from developed capital-exporting states making investments in developing countries could seek relief from actions of local governments through arbitration rather than through domestic administrative and judicial institutions. Capital exporters often regarded such domestic institutions as corrupt, incompetent, not sufficiently independent of the state, or incapable of providing timely and effective relief.

As well, domestic institutions in many countries have no jurisdiction to enforce treaty commitments to foreign investors, and domestic laws often provide no comparable protection. Investors also wanted a process that they could initiate and manage themselves rather than the more politically and practically complex alternative of having to rely on their home states to espouse their claims. In short, investment protection commitments in treaties lower political risk for investors. ISDS makes those commitments more credible and realizable.

Enhancing the credibility of their commitments has been appealing to host states, too. By agreeing to ISDS, they signal their commitment to the treaty's substantive investor protection obligations, with the hope of attracting more investment. Empirical evidence of actual investment-inducing effects, however, is mixed at best (Sauvant and Sachs 2009). Another host-state benefit associated with ISDS commitments is the depoliticization of foreign investment disputes. Disputes are adjudicated by arbitral tribunals on a legal basis rather than by contests of political, economic or military power.

4 A specific text was proposed in September 2015 (European Commission 2015b) and a revised text made public in November 2015 (European Commission 2015c).

5 Most EU countries have indicated that they will support ratification despite continuing protests (Blenkinsop and Jancarikova 2016).

Growing Concerns About ISDS

There were only a handful of investor-state cases prior to the mid-1990s but, by the end of 2015, almost 700 had been brought under ISDS provisions in bilateral investment treaties or investment chapters in free trade agreements (UNCTAD 2016). Most cases were brought by developed-country investors against developing states and transition economies. As investment agreements are increasingly entered into between developed states and countries that are now significant sources of inward investment for those states, more claims inevitably are launched against developed states. A growing number of Western European states, including Austria, Belgium, France, Germany, Greece, Italy and Spain have faced investor-state claims for the first time in the past few years. Canada has faced more claims than any other developed country – all by American investors under NAFTA.

Experience with ISDS has resulted in widespread state dissatisfaction with the process. Because investor-state cases can involve challenges to public acts by governments as opposed to commercial disputes, many argue that investor-state arbitration needs to meet higher standards for democratic accountability than traditionally have existed in ISDS procedures, which largely follow a private commercial arbitration model. Calls by academics and civil society organizations are frequently made for changes such as enhanced transparency and participation rights for affected interests (van Harten 2005). Some progress has been made in this regard, especially in Canadian and US treaties. Many of the same critics argue that the ISDS procedures need to incorporate the same guarantees of independence for decisionmakers that characterize domestic judicial systems. Much less progress has been made on this front.

The concern regarding arbitrator independence arises out of ISDS's nature. Arbitrators are appointed on an ad hoc basis for a particular dispute and paid by the parties. Typically, each disputant appoints an arbitrator and then the parties agree on a third or neutral arbitrator as chair. Critics have identified a number of issues arising out of this system (Gaukrodger and Gordon 2012). One is the risk that party-appointed arbitrators might favour the party that appointed them. More generally, since only investors can initiate cases, arbitrators might favour investors to ensure future opportunities for work. Arbitrators might be encouraged not only to make favourable decisions on the merits of ISDS claims but also to reject jurisdictional challenges. The latter would provide arbitrators with the additional benefit of prolonging proceedings and, as a result, increasing their fees.

Outside work by arbitrators in other cases and as advocates on behalf of investors or expert witnesses creates the risk of additional conflicts of interest. For example, a counsel in one case may appoint someone as an arbitrator in the hope that he or she will be appointed as an arbitrator when that arbitrator is counsel in a future case. Or, more simply, a person's role as an advocate in one case may affect their actions as an arbitrator in another case. While the seriousness of these concerns is contested (Mourre 2010), challenges to arbitrators based on conflicts of interest are increasing (Dimitropoulos 2016).[6] Calls to address these concerns are being made by an ever-growing number of academics and governments (European Commission 2015, Krajewski 2015). Many have argued that the only way to address them is to move to a judicial model with ISDS decisionmakers

6 Arbitrator challenges have been made in 68 out of 473 cases registered under the ICSID Convention and the Convention's Additional Facility Rules (Dimitropoulos 2016).

appointed for fixed terms with security of tenure, independently funded and precluded from engaging in outside activities (van Harten 2010, 2012).

Concerns about ISDS also relate to the consistency and quality of investor-state arbitration awards (Franck 2005). While there is no doubt that some awards have come to different conclusions despite applying the same law to essentially the same facts and that arbitration award quality is not always high, observers have contested the magnitude and seriousness of the problems. Some have recommended an appeal process as one way to reduce inconsistency and incoherence and ensure high-quality decisionmaking (Steger 2013). Appellate review by a body meeting high standards for independence would also address the concerns regarding ISDS arbitrators described above.

Based on these and other critiques, ISDS, as currently constituted, is facing a legitimacy crisis with some states opting out of ISDS or even terminating investment treaties altogether. South Africa has decided to rely on a new domestic investment law as its primary approach to attracting investment and to forgo, in most circumstances, negotiating new investment treaties (Schlemmer 2016). A few countries – Indonesia, Ecuador, Venezuela and South Africa – are even terminating existing investment treaties. In 2011, Australia adopted a policy of not signing treaties with ISDS provisions, though that policy has not been consistently applied (Johnson and Sachs 2015) as it recently agreed to ISDS in the TPP.

How Does CETA Respond to Concerns Regarding ISDS?

CETA seeks to address concerns about ISDS in two ways. First, it adopts many of the best practices commonly found in Canada's model foreign investment promotion and protection agreement as well as in actual Canadian investment treaties. Both Canada and the US have long used much more elaborate ISDS provisions than the very short provisions typical of the 1,200 bilateral investment treaties (BIT) among EU member states and with countries outside the EU. In part, this is in reaction to their extensive experience as respondents in NAFTA Chapter 11 cases. In some cases, CETA improves on Canadian practices.[7] Second, CETA contains certain innovations not found in any existing treaty.

Broadly speaking, these provisions are designed to give the state more control over investor-state disputes, reduce state exposure to inappropriate claims, make the ISDS process more open and efficient and respond to the concerns identified above regarding the quality and consistency of ISDS awards and the independence of arbitrators (European Commission 2014).[8]

How CETA Incorporates and Improves on Canadian Best Practices

Early information about claims and consultations requirements: Like Canada's model treaty and NAFTA, CETA ensures that a respondent state

7 This comparison is based on the Canadian model investment treaty approved by the federal cabinet in 2003 and subsequent treaties. The text of the model is available in Lévesque and Newcombe. This *Commentary* does not address the effective limitations on access to dispute settlement that arise from CETA provisions that are intended to cut down the scope of the state's substantive obligations or restrict what may be the subject of ISDS. Regarding these aspects of CETA, see van Harten 2015.

8 In this *Commentary*, "state" is used to refer to the respondent in ISDS proceedings. In claims relating to the EU, however, sometimes the respondent will be the EU itself and other times a member state. See Art. 8.21.

obtains a clear understanding of the investor's claim at an early stage and an opportunity to engage in consultations with the investor by requiring the investor to provide certain essential information prior to filing its claim. In CETA, the nature of the claim must be set out in a request for consultations. CETA requires consultations to be held within 60 days of a request for consultations (Arts. 8.19, 22). An investor cannot submit its claim until at least 180 days after its request. Both the requirement for information and the time delay before a claim may be filed are designed to facilitate an early and amicable resolution. Indeed, many NAFTA cases have been withdrawn after consultations following receipt by the state of an investor's notice of its intent to file a claim.

Time limits on claims: CETA restricts state exposure to investor claims by imposing a three-year time limit for their initiation (Art. 18.19(a)), as in NAFTA and the Canadian model. In CETA, however, the time may be extended if the investor seeks relief in local courts or tribunals. In that case, the investor must bring its CETA claim within two years of the date it ceases to pursue local relief. This flexibility is intended to encourage investors to use domestic procedures to resolve their claims before resorting to ISDS (European Commission 2014). CETA also provides that a request for consultations is deemed to be withdrawn if no claim is submitted within 18 months.[9]

Avoiding multiple proceedings: Canadian model provisions included in CETA limit a respondent state's risk that it will face a domestic or international law claim for monetary relief when an ISDS claim under CETA is filed for the same action. To commence a CETA investor-state claim, an investor must discontinue any other claim based on the same state action and waive its right to pursue relief for that action other than through ISDS (Art. 8.22(f) and (g)).

However, the investor can pursue injunctions and other forms of behavioural relief. The same approach is followed in NAFTA where the waiver of recourse has been found to permanently prevent an investor from seeking relief regardless of the outcome of its ISDS claim (*Waste Management* 2000). CETA contemplates some limitations on the effect of the waiver that are not found in other Canadian treaties.[10] As well, CETA goes on to address proceedings under another international agreement where there might be overlapping compensation or the other proceedings might have a "significant effect on the resolution of the claim brought [under CETA]"(Art. 8.25). In such a case, the CETA tribunal has to stay its own proceedings or ensure that it takes the other proceedings into account in some other way.[11]

Consolidation of ISDS claims: As in NAFTA and Canada's model treaty, a respondent state can seek to consolidate claims by multiple investors where they have a common question of law or fact and arise out of the same events (Art. 8.43). Consolidation allows a state to avoid the costs of multiple duplicative proceedings and the risk of

9 In no case can claims be brought more than 10 years after the investor knew or should have known about the events forming the basis of the claim (Art. 8.19(6)). The limitation periods are suspended if the parties agree to have recourse to mediation (Art. 8.20(5)).

10 Under CETA, the waiver ceases to apply if the tribunal rejects the claim on any of the following bases: the tribunal has no jurisdiction; the necessary pre-arbitral procedure has not been followed; the claim is rejected as manifestly without legal merit (Art. 8.32) or unfounded as a matter of law (Art. 8.33); prior to a full determination on its merits or the investor withdraws its claim (Art 8.22(5)).

11 It is not clear what the parties had in mind in adopting this provision. There have been investment cases under NAFTA in which an unresolved NAFTA trade dispute was relevant (*Cargill* 2009). Presumably, this provision only operates in relation to proceedings that are not covered by the waiver.

inconsistent decisions regarding the same state action. The equivalent provision in NAFTA has been relied on successfully by the United States.[12]

Early determination of preliminary objections by the state: The Canadian model provides that where a state makes a preliminary objection to the jurisdiction of the tribunal to hear the investor's claim, the tribunal should, wherever possible, decide the jurisdiction issue before proceeding to the merits. This provision, which has no analogue in NAFTA, addresses an anxiety frequently expressed by states that often they must go through an entire arbitration process and incur substantial costs in relation to claims that should have been thrown out because the tribunal did not have jurisdiction to decide the matter (UNCTAD 2007). CETA goes beyond Canadian practices by making it mandatory for tribunals to decide on preliminary objections related to jurisdiction, as well as other impediments to a tribunal hearing a claim, before considering the claim's merits. Tribunals are required to suspend the proceeding on the merits and decide on any preliminary objection by the state that a claim is "not a claim for which an award in favour of the claimant may be made under [CETA], even if the facts alleged by the investor were assumed to be true (Art. 8.33)."[13]

A similar early-determination requirement applies to respondent objections that the investor's claim is "manifestly without merit (Art. 8.32)." This kind of expedited process to dispose of weak cases has no analogue in NAFTA or the Canadian model, but it is provided for under the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, which govern most ISDS cases.[14] Some commentators have expressed skepticism about the significance of this provision on the basis that the number of claims that might be dismissed as manifestly without merit is likely to be small (Bernasconi-Osterwalder and Mann 2014). By contrast, approximately 18 percent of ISDS claims are rejected on jurisdictional grounds. Therefore, CETA's requirement for early determination of jurisdictional issues is likely to have a more practical impact (UNCTAD 2016).[15]

Limitations on remedies: As in the Canadian model and NAFTA, CETA remedies against the state are limited to financial compensation for losses incurred. No punitive damages are available, and states cannot be forced to change their regimes (Art. 8.39).[16] This provision confirms the general practice in ISDS cases to award only compensatory damages (Sabahi 2011).[17] Also, CETA contains a unique rule that damages shall be reduced to take

12 NAFTA Art. 1126 was relied upon to consolidate three claims in *Canfor* 2005.

13 Objections to the admissibility of the claim are also covered by this provision. These are defects in procedure that do not deprive the tribunal of jurisdiction but prevent an investor from proceeding with its claim such as a failure to give required notice. Unlike jurisdictional defects, often impediments making a claim inadmissible can be remedied.

14 Preliminary objections relating to jurisdiction and (since 10 April 2006) a manifest absence of legal merit are provided for in the ICSID Arbitration Rules Art. 41.

15 One study found that 1 percent of ICSID cases were dismissed because they were manifestly without merit (European Federation for Investment Law and Arbitration 2015).

16 Despite this scheme, states, including Canada, have sometimes changed their regime in practice following an investor's claim (e.g., *Ethyl* 1998). There is little evidence to show how often this happens in practice. Some of the approximately 26 percent of ISDS cases that settle may involve changes in state behaviour, but most settlements are confidential. Behavioural orders may be made for the purposes of granting interim relief such as to preserve evidence prior to the conclusion of a case (Art. 8.34).

17 There have been cases in which tribunals have awarded behavioural relief. For example, the payment of an energy tariff was ordered to be reinstated in *Nycomb* 2003.

into account any restitution by the state of the investor's property or the repeal or modification of the measure on which the claim is based (Art. 8.39.3). It may be that this provision will create an incentive for a state defending a claim to limit its exposure by changing its regime (Bernasconi-Osterwalder and Mann 2014).

State role in interpretation: Together, Canada and the EU can adopt interpretations of CETA's investment provisions to correct what the parties consider inappropriate interpretations by ISDS tribunals (Art. 8.31(3)). This potentially useful mechanism is found in the Canadian model and in NAFTA. It has been employed only once in NAFTA (Free Trade Commission 2001).[18] CETA also permits submissions by the state party that is not the respondent in an ISDS case on issues of treaty interpretation that are at stake in the case (Art. 8.38). Analogous provisions in NAFTA have been frequently used by Canada, Mexico and the United States.[19]

Enhancing ISDS Legitimacy

CETA also responds to ISDS legitimacy concerns by setting standards for arbitrators and guaranteeing transparency in proceedings. CETA builds on Canadian model provisions and, as discussed in the next section, bolsters their effectiveness by introducing a number of significant innovations.

Independence and competence of arbitrators: In CETA, standards for the independence and competence of the decisionmakers in its tribunal and appellate tribunal follow and, in some ways, go beyond the standards for ad hoc arbitrators under the Canadian model treaty. In CETA, however, the standards are complemented by other requirements intended to enhance the independence of tribunals and appellate tribunals. These standards and requirements are discussed in the next section.

Transparency and amicus curiae participation requirements: CETA follows Canada's model agreement by establishing transparency requirements for investor-state arbitration proceedings and is the first treaty to adopt the UN Commission on International Trade Law's UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration, which are similar to Canadian practice. All documents submitted to and issued by an ISDS tribunal must be made public and all hearings must be open the public, subject to any restrictions necessary to protect confidential or other protected information (Art. 8.36).

Meanwhile, CETA goes beyond the Canadian model and the UNCITRAL transparency rules by extending disclosure obligations to include pre-arbitration documents, like the request for consultations, exhibits attached to the parties' briefs, any mediation agreement and documents related to challenges to arbitrators (Art. 8.36.1). Though such disclosure is not required in NAFTA, it has been the Canadian practice to seek the disclosure of those documents and public hearings in any case, and, typically, all these documents have been made public (VanDuzer 2007). CETA leaves arbitrators with discretion to determine what documents or parts of documents are confidential as well as when hearings need to be closed to protect confidentiality. There is no requirement to disclose settlements in ISDS cases and, in practice, they are typically not publicized.

Canada's model provides that persons with an interest in an ISDS case may seek leave to make submissions to the ISDS tribunal as friends of

18 The NAFTA Free Trade Commission has made recommendations regarding transparency and *amicus curiae* submissions in NAFTA ISDS procedures (e.g., Free Trade Commission 2003).

19 See *Bilcon* 2015.

the court or *amicus curiae*. This procedure was first adopted in NAFTA cases, despite not being addressed specifically in the treaty or the applicable arbitral rules, and was later incorporated into Canadian treaties. Under this procedure, it is up to the tribunal to decide whether an *amicus curiae* submission will be accepted on the basis of whether it would "assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties" (Canadian Model Art. 39). There is no right for interested parties to participate and they have no standing as parties to an ISDS case even if they will be directly affected by the outcome of the case.

CETA does not set out comparable rules for *amicus* participation but relies on the UNCITRAL transparency rules, which address *amicus curiae* participation (Art. 8.36.1). These rules largely reflect Canada's existing practice (Free Trade Commission 2001, Free Trade Commission 2003).

Significant Innovations in CETA's ISDS Provisions

CETA goes beyond what is found in Canadian treaties with a view to better addressing concerns about ISDS. In particular, CETA's 2016 version goes much further in addressing ISDS critiques related to the independence of decisionmakers and the consistency of their awards, as well as a few other more minor problems with the process.

By far the most significant CETA innovations introduced in 2016 are those creating a standing tribunal and appellate body with the exclusive competence to hear investor-state claims. As noted above, the provisions reflect, though not precisely, ideas contained in a proposal that had been circulated by the EU in September 2015 (European Commission 2015b) related to the negotiations between the EU and the United States for the TTIP.

Tribunal appointment and composition: ISDS claims are to be decided by a tribunal established under the treaty (Art. 8.27.1). The CETA Joint Committee[20] must approve a 15-member tribunal consisting of five EU nationals, five Canadian nationals and five from other countries.

Provisions addressing competence of tribunal members: To address concerns about the quality of arbitrators, CETA requires that they are qualified in their respective countries for appointment to judicial office or "be jurists of recognized competence." They must have "demonstrated" expertise in public international law, but "expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements" is identified only as "desirable" (Art. 8.27(4)). These expertise standards are similar to those in Canada's model treaty.

Provisions addressing independence of tribunal members: In addition to demonstrating competence, tribunal members must be independent of the parties and not take instructions from any "organization or government with regard to matters related to the dispute (Art. 8.30)." Similar general independence standards are found in the Canadian model and in the ICSID Arbitration Rules.[21] These standards are significantly expanded in CETA. Arbitrators must not participate in any dispute with respect to which they may have a direct or indirect

20 The CETA Joint Committee is composed of EU and Canadian government representatives and co-chaired by the Canadian Minister for International Trade and the Member of the European Commission responsible for trade. It is the highest-level institution created under the agreement.

21 Article 28.2(b) of the Canadian model requires that arbitrators be "independent of, and not be affiliated with or take instructions from, either Party or disputing party." The ICSID Convention requires that arbitrators be persons who can be "relied upon to exercise independent judgment (Art. 14)."

conflict of interest. In this regard, they must comply with the International Bar Association's standards regarding conflicts of interest.

The process for dealing with arbitrator challenges is also improved. Instead of other tribunal members hearing such challenges, as is the practice under the ICSID Arbitration Rules, they are decided by the president of the International Court of Justice under a process set out in the treaty. As well, the parties, acting through the CETA Joint Committee, and based on a "reasoned recommendation" of the president of the tribunal, may remove tribunal members when their behaviour is contrary to their independence obligations or otherwise inconsistent with their continued membership in the tribunal (Art. 8.30(4)).

CETA also contemplates that the parties may agree on a code of conduct for tribunal members. The code might address what interests arbitrators must disclose, additional requirements regarding their independence and their confidentiality obligations (Art. 8.44(2)). At this point, however, the code is still to be developed by the Committee on Services and Investment established under CETA.

In addition to its independence standards, CETA's rules for the new tribunal address other concerns. First, tribunal members are not appointed on an ad hoc basis by the parties to the dispute. Instead, CETA's Joint Committee makes the appointments for a five-year term, renewable once. For each investor-state case, the president of the tribunal appoints a three-member "division" of the tribunal.[22] Each division will have an EU national, a Canadian and be chaired by a tribunal member from a third country. The president is required to appoint tribunal members to divisions "on a rotation basis" with the goal of ensuring that the composition of divisions is "random and unpredictable." For his or her part, the president is appointed for a two-year term by lot from tribunal members who are nationals of third countries.

The anticipated random and unpredictable appointment of divisions by presidents chosen by lot is intended to create a system that insulates the appointment process from any influence by the parties to a dispute.[23] The fact that all tribunal members will be appointed by the CETA parties acting through the Joint Committee may suggest the risk of arbitrators with a pro-state bias. However, this seems unlikely. Unlike the present situation under all other ISDS procedures, tribunal appointments will be made prior to any particular dispute. Therefore, there would be no reason for Canada or the EU to appoint a tribunal member based on that person's views on a specific issue. Perhaps more importantly, each party will be concerned that the tribunal act impartially when it hears claims by its investors (Schacherer 2016).

Second, once appointed, the ability of tribunal members to engage in outside work is constrained in ways intended to limit conflicts of interest. Members must "refrain from acting as counsel or as a party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law (Art. 8.30(1))." They can, however, still act as arbitrators in cases under other treaties. To encourage availability, tribunal members will be paid a monthly retainer fee at a rate to be determined by the CETA Joint Committee (Art. 8.27(12)). The Joint Committee is specifically empowered to transform the compensation arrangements into regular salary if it decides that would be more appropriate (Art. 8.27.15).

22 Appointments are to be made within 90 days of a claim's submission.

23 It also addresses concerns that have been expressed about the role of appointing authorities under the ICSID Convention (van Harten 2016).

While this retainer (depending on its value) might provide tribunal members with some security of tenure, the failure to prohibit work as arbitrators means the CETA tribunal does not represent a complete shift to a judicial model. Tribunal members will still have a financial interest in claims being made and the amount of time cases take. They will be paid on a per diem basis at the same rate as ICSID arbitrators, currently US$3,000 per day. Since appointments are random, they cannot have any expectation of being appointed to any particular new case. They would have a financial interest in substantial increases in the number of cases overall leading to more work for all members of the tribunal. Nevertheless, while tribunal members retain a financial interest, a number of the structural features of ISDS that have been perceived to threaten independence have been removed or mitigated.

Appellate tribunal: One frequently expressed concern regarding ISDS awards has been their lack of consistency (Steger 2013). While there is some debate about the seriousness of the problem, there is general agreement that different conclusions by ISDS tribunals on the same or similar facts have undermined the legitimacy of the ISDS process (UNCTAD 2014, Schill 2009). Many have advocated for some form of appellate review to address this concern. In ISDS, currently, there is no process for the appeal of investor-state awards. ICSID awards may be annulled under the ICSID Convention and awards under other arbitral rules may be set aside under the domestic law of the place of arbitration. In the interests of finality and the expeditious resolution of disputes, these procedures do not provide an appeal on the basis that a tribunal made an error of law. Relief is limited to serious flaws in the procedure of the arbitration or the tribunal acting outside its jurisdiction.[24]

But CETA has created an appellate tribunal that has the power to uphold, modify or reverse an award based on broader grounds (Art. 8.28(2)):

> (a) errors in the application or interpretation of applicable law;
>
> (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; or
>
> (c) the grounds set out in … the ICSID Convention.

By allowing appeals based on errors of law and significant errors of fact, CETA allows an extensive review of tribunal decisions.[25] By comparison, the WTO Appellate Body can review only issues of law and legal interpretation in panel reports (DSU Art 17.6).[26]

CETA appeal tribunal decisions are intended to be final. CETA prohibits states and investors from seeking "to review, set aside, annul, revise or initiate any other similar procedure" in relation to appeal tribunal awards (Art. 8.28(9)), apparently excluding ICSID annulment proceedings and, in non-ICSID arbitrations, applications to have appeal tribunal awards set aside in domestic courts.

The appeal tribunal sits in divisions of three. While the panel members are to be randomly determined, no process is specified. Appeal tribunal members are, like first-level tribunal members, appointed by the CETA Joint Committee and must meet the same standards for independence and expertise. Many other issues regarding the appeal tribunal's nature and operation have been left to the Joint Committee to determine, including the

24 Many national laws also permit an award to be set aside on the basis that it is contrary to public policy.

25 No standard of review is specified in CETA.

26 According to the European Commission, the WTO Appellate Body was the model for the CETA appeal tribunal (European Commission 2015).

number of members, their remuneration and appeal procedures (Art. 8.28(7)).

It is likely that the same arrangements to protect the independence of tribunal members will be adopted. The contribution of the appeal tribunal to the legitimacy of the ISDS process will depend, in part, on how these and a multiplicity of other design issues are resolved. In general, though, it seems likely that a small number of people deciding all appeals will contribute to consistent decisionmaking (Schacherer 2016).

Appellate review might increase the duration and corresponding expense of investor-state arbitration. However, this impact may be mitigated by time lines that have been established for the tribunal process, as discussed below.

Timeline for tribunal decisions and appeals: One of the challenges for both states and investors with the ISDS process has been the length of time tribunals take to issue a final award. On average, investor-state cases have taken three years from the date of the claim to the issuance of the final award, but many cases take much longer (Gaukrodger and Gordon 2012). Unlike other investment treaties, CETA imposes a time limit for awards. The tribunal must issue its final award within 24 months of the date the claim is submitted, though it may take longer if it provides the parties with reasons for the delay (Art. 8.39(7)). Appeals must be commenced within 90 days of the tribunal award, but there is no time limit for completing appeals.

While the tribunal may, in good faith, try to meet the 24-month deadline, it may not be effective to guarantee that cases are consistently resolved in a timely way. The strict timelines for panel decisions at the WTO and under NAFTA Chapter 19 have been routinely exceeded (Steger 2011, Mcrory 2004).

Tribunal power to deal with abuse of process: Some ISDS tribunals have asserted that they have the power to deal with abuses of the process as a jurisdictional issue, even without an express provision in the applicable investment treaty.[27] CETA explicitly gives the tribunal such a power. An investor may not submit a claim where its investment was made through "fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process (Art. 8.18(3))." The EU says this provision should prevent an investor from adopting the nationality of one CETA party solely for the purpose of bringing a claim, sometimes referred to as treaty shopping (EU 2014). The language seems broad enough to include a much wider range of inappropriate behaviour by the investor in connection with the investment made. It will be up to ISDS tribunals to determine its scope.

Loser pays litigation costs: In addition to the early-determination procedures described above, CETA seeks to discourage frivolous claims by providing that the costs of the arbitration (i.e., the arbitrators' fees and administrative expenses) will be paid by the losing party. The loser also has to pay the winner's costs, including legal representation costs, except in exceptional circumstances (Art. 8.34(5)). Traditionally, arbitration costs are split and each party bears its own legal representation expenses. However, a costs-follow-success approach has been adopted in a number of investor-state cases (e.g., EDF (*Serv.*) 2009, *International Thunderbird* 2006). More than half of the known cases completed in 2010 and the first half of 2011 shifted at least some costs in favour of successful parties (Gaukrodger & Gordon 2012), though there is no consistent practice.

27 See *Phoenix Action* 2009. Some tribunals have addressed these kinds of issues by requiring an investor to proceed with its claim only if it has clean hands, interpreted in some cases to include compliance with domestic regulation (e.g., *Hesham Talaat M Al Warraq* 2014).

Use of mediation contemplated: Under CETA, the parties may agree to mediation with a view to resolving the dispute without expensive adversarial proceedings at any time in an ISDS case (Art. 8.29). Provisions permitting various forms of alternative dispute resolution (ADR) procedures, like mediation, are not common in international agreements (UNCTAD 2010). The parties to a dispute can, however, always agree to mediation or any other form of ADR. Despite this possibility under other treaties, ADR has not been frequently used in ISDS (UNCTAD 2010). It is not obvious that CETA's recognition of an option that already existed will do much to encourage the use of mediation.

States to give sympathetic consideration to investor requests for single arbitrator: Unlike most investment treaties, CETA contemplates the possibility that claims will be heard by a sole arbitrator instead of the usual three-person tribunal with a view to reducing the costs of the process. Where the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low, the respondent state must give "sympathetic consideration" to an investor's request for a sole arbitrator (Art. 8.20(5)). Despite being permitted, single arbitrators have been rare in investor-state cases. Whether CETA's sympathetic consideration requirement will do anything to expand access to ISDS seems doubtful.[28]

Third-party funding: A relatively recent issue in investor-state arbitration has been third parties funding investors' claims in return for a portion of any eventual damages award.[29] Third-party funding could provide benefits for investors who otherwise have insufficient resources to pursue a claim. Nevertheless, several concerns have been raised regarding this increasingly common practice (Gaukrodger and 2013). The financial interest of third parties in a damages award may cause them to resist other ways of resolving disputes that might be negotiated between investors and states, such as settlements in which compensation is reduced or eliminated because the state agrees to change its regime in some way.

Another concern is possible conflicts of interest. Typically the involvement of third parties is not disclosed. As a result, conflicts of interest between an arbitrator and a funder might exist that should disqualify the arbitrator. In the few cases in which third-party funding has been disclosed, ISDS tribunals have not considered it to be improper or even relevant to their decisions.[30]

CETA is the first investment treaty to address third-party funding. The party benefiting from third-party funding must disclose the identity of the funder at the date of submission of the claim or, if the third-party funding agreement is entered into later, as soon as possible after the agreement is made (Art. 8.26).

Limitation regarding tribunal's jurisdiction to interpret domestic law: CETA is also one of the first treaties to address and limit the manner in which tribunals deal with domestic law.[31] The CETA tribunal does not have jurisdiction to determine the legality of a state measure under domestic law when a state has allegedly breached its treaty obligations. Sometimes, however, it is necessary for an ISDS

28 CETA also mandates that its Joint Committee consider adopting rules designed to reduce the "financial burden on claimants who are natural persons or small and medium-sized enterprises (Art. 8.39(6))."

29 There have been at least two cases of third parties funding states in their defence against investor claims, though funding of states does not raise the same issues because the funders do not have the same financial stake in the outcome (Gaukrodger and Gordon).

30 See *Abaclat* 2011. There was a strong dissent from one tribunal member on this issue.

31 A similar provision is in the Canada-Colombia FTA.

tribunal to determine the effect of domestic law. For example, if an investor claims its rights under a domestic law contract have been affected by state action in breach of its investment-treaty obligations while the state claims that the contract was lawfully terminated, the tribunal will have to decide if the state's position is correct as a matter of domestic law.

While several states have expressed concerns about ISDS tribunals' interpretation of their domestic law, the issue in the CETA context likely has more to do with EU concerns that the CETA tribunal and appeal tribunal should not be permitted to interpret EU law. Under EU law, as interpreted in a number of decisions of the European Court of Justice, this is the exclusive preserve of the European Court of Justice (European Commission 2015).[32]

Assessing CETA's ISDS Provisions

In short, CETA reproduces many of the best features of ISDS procedures that are found in NAFTA, Canada's model investment treaty and many Canadian treaties, with some improvements and innovations that are likely to enhance efficiency, reduce state exposure to inappropriate claims and generally give states more control over the process. CETA also takes significant steps toward addressing the concerns regarding the legitimacy of the ISDS process though, as discussed below, CETA is not a complete response to critics' concerns.

Summary of CETA's Key ISDS Features

The following CETA provisions benefit the respondent state in ISDS cases. Similar clauses are found in Canadian investment treaties, including the TPP.[33]

- Ensuring that states have early information about investor claims and a required minimum time period to consult about those claims facilitates the settling or otherwise disposing of claims expeditiously before significant costs are incurred and positions entrenched.
- Imposing a three-year time deadline for investor claims limits state exposure.
- The requirement for an investor to terminate other proceedings and waive the right to pursue them for the same state action that is the basis of the investor's ISDS claim avoids multiple proceedings.
- The procedure for consolidating multiple investor claims arising out of the same events and raising common questions of law or fact can reduce state costs and prevent inconsistent decisions.
- Procedures relating to the early determination of preliminary objections by the state that permit it to reject investor claims on the basis of (i) the tribunal not having jurisdiction, or (ii) the investor's claim being inadmissible or manifestly without legal merit, ensure the early resolution of claims that ultimately would be decided in the state's favour.[34]
- CETA parties' ability to adopt binding interpretations of CETA investment-chapter provisions permits them to avoid the continued application of tribunal interpretations they consider wrong-headed.
- In relation to ongoing cases, the right to make submissions on questions of interpretation gives the non-disputing CETA party the opportunity to advocate for what it thinks is the correct approach to interpretation.

32 There are a number of other issues related to the compatibility of ISDS and the EU legal order, which are far beyond the scope of this *Commentary*. See Schill 2015a.

33 Versions of these provisions are found in Chapter 9, Section B of the TPP.

34 The main innovation in CETA compared to Canadian practice is that the tribunal must adjudicate such preliminary state challenges before proceeding to the merits, saving time and costs.

CETA also contains a number of other provisions with no analogue in Canadian practice that are intended to further improve the state's position in ISDS. Its requirement for disclosure of third-party funding arrangements ensures that a tribunal has an opportunity to address any issues that may arise in a particular case. Meanwhile, the "loser pays" rules will be helpful to states in the cases they successfully defend and may help to discourage frivolous claims. Of course, states will bear a heavier burden in the significant proportion of cases they lose. On balance, "loser pays" may be helpful to Canada, which has exceeded the historical success rate for states defending ISDS claims.

The express grant of power to the tribunal to deal with abuse of process and other forms of investor misbehaviour may allow the respondent state to have claims thrown out in a much wider set of circumstances than previously, though it will remain to be seen how broadly this power is interpreted and what evidence of investor misbehaviour will be required.

Meanwhile, the most significant and important innovations in CETA's ISDS procedures go further than any other Canadian treaty, including the TPP, to address concerns about the legitimacy of ISDS proceedings. CETA is the first treaty to expressly incorporate the UNCITRAL transparency rules, which establish requirements regarding the transparency of ISDS proceedings and the participation of third parties. These guarantees respond to concerns regarding the legitimacy of the ISDS procedures. In doing so, CETA exceeds to some extent the requirements of NAFTA, as well as the guarantees in Canada's model treaty and many of its actual treaties.[35]

While other agreements based on the Canadian model set standards for independence and competence of arbitrators that are similar to CETA's, CETA both strengthens those standards and adopts a number of institutional requirements to support their operation in practice. For example, CETA requires that tribunal members meet the requirements of their home jurisdiction to be judges and adopts the well-established International Bar Association standards regarding conflicts of interest. Challenges to arbitrators are to be dealt with not by the other members of the tribunal but by a judicial official completely independent of the proceeding: the President of the International Court of Justice.

CETA's major innovation is moving away from an arbitration process where awards are made by tribunals appointed by the disputing parties. In stark contrast, CETA establishes a tribunal whose members are chosen for fixed terms by the state parties acting through the Joint CETA Committee. Each case is to be decided by a three-person division of the tribunal chosen by the president of the tribunal who is not a national of the party states. The president is to ensure that appointments are random and unpredictable, though the modalities for how this is to occur are not specified. Tribunal members are to be paid a retainer that is still to be fixed, have a general obligation to be available to perform their functions and cannot work as counsel or expert witnesses in other investor-state disputes. Tribunal members are not prohibited from taking appointments as arbitrators in other cases and are compensated on the same per diem basis as ICSID arbitrators. Despite these holdovers from ISDS practice, decisionmakers under CETA must meet higher standards for independence, have a much more limited stake in new cases being brought and are more insulated from appearances of influence both in general and in relation to a particular case.

A second aspect of the movement away from the existing system of ad hoc arbitration is the establishment of an appeals tribunal capable of

35 The TPP contains similar but slightly more limited guarantees though it does so expressly without referring to the UNCITRAL Transparency Rules (Shacherer 2016).

reviewing tribunal awards for errors of law and manifest errors in the assessment of facts as well as for the procedural and jurisdictional grounds for annulments under the ICSID Convention. Appellate review means that bad decisions can be corrected. Appellate review has the potential to improve both the quality and consistency of arbitration awards. Since appeal tribunal members have to meet the same standards for competence and independence as tribunal members, CETA's appeal process is likely to contribute to the legitimacy of ISDS in CETA, but the impact will depend on specific arrangements that have yet to be determined.

The TPP by contrast, does not address independence standards and only deals with institutional support for independence in an aspirational way. An appellate review mechanism, "other institutional arrangements" related to ISDS and the application of a code of conduct for arbitrators are only agenda items for further discussion.[36]

Does ISDS in CETA Respond to Critics' Concerns?

The answer to this question is yes, but not fully. Random case assignment of tribunal members eliminates the concern that the disputants could influence the appointment of arbitrators, a major concern with ISDS ad hoc appointment by the parties. Nevertheless, CETA's arrangements do not provide the same independence guarantees that would exist if these decisionmakers had fixed compensation, security of tenure and were prohibited from all outside activities that could compromise their independence (van Harten 2016). Tribunal members can still engage in outside work as arbitrators, though they are precluded from engaging in work as advocates and expert witnesses and have a general obligation to hold themselves available. The role of the retainer in providing sufficient compensation to discourage outside work will depend on its size.

Meanwhile, adoption of an appeals tribunal also does not represent a full shift to critics' desire for a judicial model. For example, there are many issues related to the appeal tribunal design that remain to be decided. Nevertheless, the prospect for review of decisions to correct errors of law and manifest errors in the appreciation of the facts by a small group of experts meeting high standards for independence bolstered by institutional requirements, perhaps going beyond those applicable to tribunal members, would represent a significant improvement over the existing system. Such an appeal body would undoubtedly contribute to the quality and consistency of decisionmaking and enhance the legitimacy of CETA's ISDS process.

Overall, while critics' concerns about decisionmaker independence have not been fully addressed, CETA does take a substantial step toward doing so. It also provides for internal procedures for further development of the ISDS process that could be a more complete response.[37]

Conclusion

CETA incorporates Canadian best practices designed to enhance the state's ability to manage investor-state disputes and addresses many of the legitimacy-based concerns that have been raised, such as those regarding transparency and *amicus curiae* participation. CETA also contains innovations that makes the ISDS process

36 See TPP Arts. 9.21.6 and 9.25. The independence standards in the applicable arbitral rules apply.

37 There is one other area in which CETA does not respond to critics' concerns. The treaty does not allow all affected persons to have standing as parties in ISDS cases, which critics say should be authorized as a matter of procedural fairness (van Harten 2016).

more efficient, reduces the exposure of states to inappropriate claims and gives states more control over the process. From a respondent state's point of view, these represent improvements over what Canada has in NAFTA and its more recent treaties.

CETA also responds to fundamental concerns of ISDS critics regarding arbitrator independence, but not fully. The introduction of first instance and appellate tribunals, despite some admittedly incomplete institutional guarantees of independence, is a significant step toward a fully judicialized dispute resolution system. The ISDS provisions in CETA represent an important stage in the reform process, but certainly not the end point.[38] Indeed, CETA itself contemplates its further development.

One of the practical challenges in getting to a true gold standard is cost. It is hard to justify funding permanent full-time, first-instance and appeals courts that may not have a steady diet of cases. While the scale of the two-way investment relationship between Canada and the EU is large and growing (Canada 2014), it is impossible to predict the frequency of investor-state cases. A multilateral tribunal and appellate body would be more cost effective. The CETA parties have agreed to pursue the establishment of such institutions and to shift CETA disputes to them should they ever be put in place (Art. 8.29).

In the end, dispute resolution under CETA resembles arbitration, but with some court-like features. Possibly it was considered inappropriate to go further when reviewing CETA, the context of which was to be a "legal scrub" of an agreed text rather than a renegotiation. Canadian reluctance to move away from traditional ad hoc arbitration was likely also at play. Based on the public positions taken by the European Commission, it seems clear that the EU was the driver in the discussions leading to the establishment of the tribunal and appeals tribunal.[39] Canada went along to get along.

In the TPP, by contrast, Canada has agreed to an ISDS process that, despite some improvements, continues to be based on ad hoc arbitration. Given the different directions in the development of ISDS procedures exemplified by these two leading agreements, it would be timely for Canada to engage in a thorough-going review of its approach to ISDS. Canada needs to decide what kind of ISDS model best suits Canadian interests.[40] While not perfect, CETA's approach has the best claim to legitimacy in any treaty to date.

38 A recent proposal by Markus Krajewski circulated by the German government goes further in addressing these concerns about independence, impartiality and competence, proposing, among other things, a standing investment court (Krajewski 2015).

39 In 2015, the European Commission expressed its commitment to transform ISDS in its agreements into a system that would operate like traditional courts (European Commission 2015).

40 A similar plea was made more than three years ago by international trade expert and C.D. Howe Institute Senior Fellow Larry Herman (Herman 2013).

REFERENCES

Bernasconi-Osterwalder, Nathalie, and Howard Mann. 2014. *IISD Report: A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)."* Winnipeg: International Institute for Sustainable Development. February.

Blenkinsop, Philip, and Tatania Jancarikova. 2016. "EU seeks to save Canada trade deal as prospects for deal with U.S. fade." *The Globe and Mail. 23 March.* Available at: www.theglobeandmail.com/report-on-business/economy/eu-seeks-to-save-canada-trade-deal-as-prospects-for-deal-with-us-fade/article32019472. Accessed 24 September 2016.

Canada. 2014. *Canada's State of Trade: Trade and Investment Update – 2014.* Available at: www.international.gc.ca/economist-economiste/performance/state- point/state_2014_point/index.aspx?lang=eng#6.0. Accessed 10 August 2015.

Canada and European Commission. 2012. *Assessing the costs and benefits of a closer EU-Canada economic partnership: A Joint Study by the European Commission and the Government of Canada.* Available at: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/study-etude.aspx?lang=eng. Accessed 10 August 2015.

Dimitropolous, Georgios. 2016. "Constructing the Independence of International Investment Arbitrators: Past Present and Future." *Northwestern Journal of International Law & Business* 36: 371. April.

European Commission. 2016. European Commission proposes signature and conclusion of EU-Canada trade deal. Available at: europa.eu/rapid/press-release_IP-16-2371_en.htm. Accessed 6 August 2016.

———. 2015. *Commission Staff Working Document: Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement.* SWD(2015) 3 final. 13 January 2015. Available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf. Accessed 10 August 2015.

———. 2015a. *Investment in TTIP and beyond – the path for reform* (submitted to European Parliament and Council of Europe on 5 May 2015). Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. Accessed 10 August 2015.

———. 2015b. "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations." Press release, 16 September 2015. Attaching draft text: Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-commerce. Accessed 31 August 2016.

———. 2015c. *European Union's Proposal for Investment Protection and Resolution of Investment Disputes*, Press Release, 12 November.

———. 2014. *Investment Provisions in The EU-Canada Free Trade Agreement (CETA).* Available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf. Accessed 15 August 2015.

European Federation for Investment Law and Arbitration. 2015. *A response to the criticism against ISDS*, 17 May 2015. Available at: http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf. Accessed 21 September 2016.

European Parliament. 2015. *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP).* (2014/2228(INI)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN&language=EN. Accessed 10 August 2015.

Franck, Susan. 2005. "The Legitimacy Crisis in International Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions." *Fordham Law Review* 73: 1521. December.

Gabriel, Sigmar. 2014. "Letter to EU Commissioner Karel de Gucht." 26 March 2014. Available at: http://www.bmwi.de/BMWi/Redaktion/PDF/B/briefsigmar-gabriel-de-gucht-zum-investitionsschutz-beim-ttip,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf. Accessed 1 February 2015.

Gaukrodger, David, and Kathryn Gordon. 2012. *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*. OECD Working Papers on International Investment, 2012/03. Paris: OECD Publishing. March.

Herman, Laurence. 2013. "Time to rethink foreign investment protection agreements? Perhaps." *The Globe and Mail*. 4 March 2013. Available at: www.theglobeandmail.com/globe-debate/time-to-rethink- foreign-investment-protection-agreements-perhaps/article9256169. Accessed 15 August 2015.

Hodgson, Matthew. 2014. *Counting the costs of investment treaty arbitration*. Available atwww.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf. Accessed 31 August 2016.

Johnson, Lise, and Lisa Sachs. 2015. "International Investment Agreements, 2013: A Review of Trends and New Approaches." *Yearbook of Investment Law & Policy 2013-2014*, Andrea Bjorklund, ed. Oxford. Oxford University Press. August.

Lévesque, Céline, and Andrew Newcombe. 2013. "Canada" in *Commentaries on Selected Model Investment Treaties*, Chester Brown (ed). Oxford: Oxford University Press. January.

Krajewski, Markus. 2015. *Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA*. Submitted to the Council of Europe by German Vice Chancellor and Minister of Foreign Affairs and Energy Sigmar Gabriel on 7 May 2015. Available at: www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf%e2%80%8b. Accessed 10 August 2015. May.

Mcrory, Patrick. 2004. "Chapters 19 and 20 of NAFTA: An Overview and Analysis of NAFTA Dispute Settlement," in *The First Decade of NAFTA: The Future of Free Trade in North America*, K. Kennedy, (ed). Ardsley, NY: Transnational. 473. January.

Mourre, Alexis. 2010. "Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration." Kluwer Arbitration Blog (5 October 2010). October.

NAFTA Free Trade Commission. 2001. Notes of Interpretation of Certain NAFTA Chapter 11 Provisions. 31 July.

———. 2003. Statement of the Free Trade Commission on Non-disputing Party Participation. 7 October.

Sabahi, Borzu. 2011. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*. Oxford: Oxford University Press. June.

Sauvant, Karl, and Lisa Sachs. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*. Oxford: Oxford University Press. March.

Schacherer, Stefanie. 2016. "TPP, CETA, and TTIP Between Innovation and Consolidation – Resolving Investor-state Disputes under Mega-regionals." *Journal of International Dispute Settlement* 7(1). July.

Schill, Stephan. 2015. Kluwer Arbitration Blog. 2 March 2015. Available at: http://kluwerarbitrationblog.com/blog/2015/03/02/the-german-debate-on-investor-state-dispute- settlement. Accessed 10 August 2016.

———. 2009. *Multilateralizing International Investment Law*. Cambridge: Cambridge University Press. September.

———. 2016. "The Proposed TTIP Tribunal and the Court of Justice: What Limits to Investor-State Dispute Settlement under EU Constitutional Law?'" (Verfassungsblog, 29 September 2015.) Available at: www.verfassungsblog.de/en/the-proposed-ttip-tribunal-and-the-court-of-justice-what-limits-to- investor-state-dispute-settlement-under-eu-constitutional-law/#.VhPdKPkYMmA. Accessed on 31 August.

Schlemmer, Engela C. 2016. "An Overview of South Africa's Bilateral Investment Treaties and Investment Policy." *ICSID Review* 31: 167. March.

Steger, Debra. 2011. "Establishment of a Dispute Settlement Tribunal in the WTO." In Trade and Development Symposium. International Centre for Trade and Sustainable Development Available at: http://ssrn.com/abstract=2065448. Accessed 31 August 2016.

————. 2013. "Enhancing the legitimacy of international investment law by establishing an appellate mechanism." In A. de Mestral and C. Lévesque (eds). *Improving International Investment Agreements*. London and New York: Routledge, 247-264. November.

UNCTAD. 2015. *ISDS Issues Note No. 2 2016, Investor-State Dispute Settlement: Review of Developments in 2015*. New York and Geneva: United Nations. 2016. June.

————. 2010. *Investor-State Disputes: Prevention and Alternatives to Arbitration*. New York and Geneva: United Nations. March.

————. 2007. *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-making*. New York and Geneva: United Nations. April.

VanDuzer, J. Anthony. 2007. "Enhancing the Procedural Legitimacy of Investor-state Arbitration Through Transparency and Amicus Curiae Participation." *McGill Law Journal* 52(4): 681. January.

Van Harten, Gus. 2005. "Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law" *Arbitration International* 21(4): 493. October.

————. 2010. "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law." In *International Investment Law and Comparative Public Law*, Stephan Schill (ed). Oxford: Oxford University Press. 627. October.

————. 2015. "The European Commission's push to consolidate and expand ISDS: An assessment of the proposed Canada-Europe CETA and Europe-Singapore FTA." Osgoode Hall Law School Legal Studies Research Paper Series 11(05). June.

————. 2016. "ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard." Centre for International Governance Innovation. Available at: https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard.

————. 2016a. "The European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration? In *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Steffen Hindelang and Markus Krajewski, (eds). Oxford: Oxford University Press. March.

TREATIES

Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Signed 18 March 1965, entered into force 14 October 1966. 575 *United Nations Treaty Series* 159. Rules of Procedure for Arbitration Proceedings.

Australia-Brunei Darussalam-Canada-Chile-Japan-Malaysia-Mexico-New Zealand-Peru-Singapore-United States-Vietnam: Trans-Pacific Partnership. Signed 4 February 2016, not yet in force. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng> accessed 26 September 2016.

Australia-United States: Free Trade Agreement Between Australia and the United States of America. Signed 5 July 2004, entered into force 1 January 2005. *Australian Treaty Series* 1.

Canada-China: Agreement between the Government of Canada and the Government of the Peoples' Republic of China for the Promotion and Protection of Investments. Signed 9 September 2012, entered into force 1 October 2014. *Canada Treaty Series* 2014/26.

Canada-Mexico-United States: North American Agreement Free Trade Agreement. Signed 14 September 1993, entered into force 1 January 1994. *Canada Treaty Series* 1994/2.

Canada-EU: Comprehensive Economic and Trade Agreement between Canada and the European Union. Concluded 5 August 2014, not yet in force Available at: http://www.international.gc.ca/trade-agreements-accords- commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>accessed 10 August 2015.

Canada-Israel: Free Trade Agreement between the Government of Canada and the Government of the State of Israel. Signed 31 July 1996, entered into force 1 January 1997. *Canada Treaty Series* 1997/49.

Canada-EFTA: Free Trade Agreement Between the Government of Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland). Signed 26 January 2008, entered into force 1 July 2009. *Canada Treaty Series* 2009/3.

China-Australia: Free Trade Agreement Between the Peoples' Republic of China and Australia. Signed 17 June 2015 (not yet in force).

EU-Singapore: Free Trade Agreement Between the European Union and Singapore. Initialed 17 October 2014, not yet in force. Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 10 August 2015.

EU-Vietnam: Free Trade Agreement Between the European Union and Vietnam: published 1 February 2016 Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 31 August 2016.

United States-Korea: Free Trade Agreement Between the United States of America and the Republic of Korea. Signed 10 February 2011, entered into force 15 March 2012. Available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> accessed 10 August 2015.

WTO: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, signed 21 April 1994, entered into force 1 January 1995. *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 United Nations Treaty Series* 401, 33 *International Legal Materials* 1226 (1994).

ARBITRATION CASES

Abaclat v. Republic of Argentina. Decision on Jurisdiction and Admissibility ICSID Case No. ARB/07/05, 4 August 2011. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf> accessed 31 August 2016.

AbitibiBowater Inc. v. The Government of Canada. Consent Award, 15 December 2010. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf> accessed 10 August 2015.

Canfor Corporation v. United States of America; Tembec, Inc. et al. v. United States of America and Terminal Forest Products Ltd. v. United States of America, Order of the Consolidation Tribunal, 7 September 2005. Available at: http://www.state.gov/documents/organization/53113.pdf> accessed 31 August 2016.

Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf> accessed 21 September 2016.

Clayton and Bilcon v. The Government of Canada. Submission of the United States of America, 17 March 2015. Available at: http://www.italaw.com/sites/default/files/case-documents/italaw1430_0.pdf> accessed 20 July 2016.

International Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL. Arbitral Award, 26 January 2006. <http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf>accessed 10 August 2015.

Dow Agrosciences v. The Government of Canada. Settlement Agreement 25 May 2011. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/dow-03.pdf> accessed 10 August 2015.

EDF International S. A., SAUR International S. A. and León Participaciones Argentinas S. A. v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufman-Kohler, 25 June 2008. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf>accessed 10 August 2015.

EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13. Award, 8 October 2009. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf>accessed 10 August 2015.

Eli Lilly and Company v. The Government of Canada. UNCITRAL. Notice of Intent 13 June 2013. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/eli-02.pdf>accessed 2 February 2016.

Ethyl Corporation v. The Government of Canada, UNCITRAL. Award on Jurisdiction, 24 June 1998. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl- 08.pdf>accessed 10 August 2015.

Hesham Talaat M Al Warraq v. The Republic of Indonesia. UNCITRAL, Final Award, 15 December 2014. Available at: http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf> accessed 30 August 2016.

Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC. Award, 6 December 2003.

Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5. Award, 15 April 2009. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf>accessed 10 August 2015.

Pope & Talbot v. The Government of Canada. Award in respect of damages, 31 May 2002. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-36.pdf> accessed 10 August 2015.

S.D. Myers, Inc. v. Government of Canada, UNCITRAL. Second Partial Award, 21 October 2002. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers- review-02.pdf> accessed 10 August 2015.

Sun Belt Water, Inc. v. Government of Canada, notice of claim filed 27 November 1998. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/sunbelt.aspx?lang=eng> accessed 31 August 2016.

Waste Management v. Government of Canada, Final Award (Dismissing on Jurisdiction), 2 June 2000. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0892.pdf> accessed 31 August 2016.

NOTES:

Recent C.D. Howe Institute Publications

October 2016	Kronick, Jeremy, et Alexandre Laurin. « *Une vision globale : Comment le quatrième pilier affecte la préparation à la retraite* » Institut C.D. Howe Commentaire N° 457.
October 2016	Spicer, Zachary, and Adam Found. *Thinking Regionally: How to Improve Service Delivery in Canada's Cities.* C.D. Howe Institute Commentary 458.
October 2016	Jason, John. "Swimming with Whales: How to Encourage Competition from Small Banks." C.D. Howe Institute E-Brief.
September 2016	Kronick, Jeremy, and Alexandre Laurin. *The Bigger Picture: How the Fourth Pillar Impacts Retirement Preparedness.* C.D. Howe Institute Commentary 457.
September 2016	Baldwin, Bob. *Assessing the Retirement Income Prospects of Canada's Future Elderly: A Review of Five Studies.* C.D. Howe Institute Commentary 456.
September 2016	Snoddon, Tracy. "Carbon Copies: The Prospects for an Economy-wide Carbon Price in Canada." C.D. Howe Institute E-Brief.
September 2016	Robson, B.P. William. "Healthcare Spending Decelerating? Not so Fast!" C.D. Howe Institute E-Brief.
August 2016	Ambler, Steve. "Ripple Effects: Oil Price Shocks and Monetary Policy." C.D. Howe Institute E-Brief.
August 2016	Coleman, James W., and Sarah Marie Jordaan. "Clearing the Air: How Canadian LNG Exports Could Help Meet World Greenhouse Gas Reduction Goals." C.D. Howe Institute E-Brief.
August 2016	Matteo, Livio Di, and Colin Busby. *Hold the Applause: Why Provincial Restraint on Healthcare Spending Might Not Last.* C.D. Howe Institute Commentary 455.
August 2016	Le Pan, Nicholas. « *Les lignes de faille : Tremblements de terre, assurance, et risque financier systémique* » Institut C.D. Howe Commentaire N° 454.

Support the Institute

For more information on supporting the C.D. Howe Institute's vital policy work, through charitable giving or membership, please go to www.cdhowe.org or call 416-865-1904. Learn more about the Institute's activities and how to make a donation at the same time. You will receive a tax receipt for your gift.

A Reputation for Independent, Nonpartisan Research

The C.D. Howe Institute's reputation for independent, reasoned and relevant public policy research of the highest quality is its chief asset, and underpins the credibility and effectiveness of its work. Independence and nonpartisanship are core Institute values that inform its approach to research, guide the actions of its professional staff and limit the types of financial contributions that the Institute will accept.

For our full Independence and Nonpartisanship Policy go to www.cdhowe.org.

C.D. HOWE
INSTITUTE

67 Yonge Street, Suite 300,
Toronto, Ontario
M5E 1J8

Canadian Publication Mail Sales
Product Agreement #40008848